

MAY 10 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1538

JOHN D. CALLAHAN, et al.,
Petitioners,

v.

CHARLES E. KIMBALL, et al.,
Respondents.

**BRIEF OF RESPONDENTS IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Respondents submit that Oregon's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied for the following reasons:

1. The two different panels of the Court of Appeals for the Ninth Circuit which considered this case both recognized that Congress left intact tribal hunting and fishing treaty rights when it terminated other

aspects of the federal relationship with the Klamath Indian Tribe in the Klamath Termination Act, 25 U.S.C. §§564-564x. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974) (*Kimball I*), *on remand*, 590 F.2d 768 (9th Cir. 1979) (*Kimball II*). The courts found that Congress established two classes of tribal members (withdrawn members and remaining members) solely for the purpose of identifying which members would take cash and which members would take real property to be distributed under the provisions of the Act. The membership classifications did not touch upon matters, such as tribal control over hunting and fishing, which were unaffected by the termination legislation. Further, the courts confirmed that neither the statutory creation of two classes of members nor the statutory transfer of tribal lands to national forest status extinguished the treaty rights preserved in 25 U.S.C. §564m(b) or the existence of future tribal self-government sanctioned by 25 U.S.C. 564r.¹ In our judgment the panels in *Kimball I* and *Kimball II* considered fully all of the issues and correctly decided the claims.

2. While the exercise of treaty hunting and fishing rights can affect under certain circumstances private property interests of non-Indians, e.g., see *United States v. Winans*, 198 U.S. 371 (1905), this case, like *Antoine v. Washington*, 420 U.S. 194, 207, n.11 (1975), does not involve claims against private landowners. *Kimball I*, 493 F.2d at 569, n.10; *Kimball II*, 590 F.2d at 773, n.8 and 775. As a result this litigation does not present difficult and potentially far-reaching ques-

¹ The courts below reached these conclusions by relying on recent decisions of this Court, primarily *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977).

tions relating to the nature and scope of treaty rights on privately-held lands. To the contrary, this case raises only a limited issue—namely, the extent to which Oregon may regulate the exercise of Klamath treaty rights within the former Klamath Indian Reservation.

3. Oregon insists that this Court should grant review in order to protect state conservation interest on the former Klamath Indian Reservation.² But Oregon requested, and the Court of Appeals in *Kimball II* granted, a remand to the United States District Court for the District of Oregon for the express purpose of allowing Oregon to demonstrate the necessity for state regulation of the Klamath treaty rights. 590 F.2d at 776-77. On remand, then, Oregon will have a full opportunity to present its enforcement and wildlife management concerns.

4. The opinions of the Court of Appeals are of narrow applicability. This case is not of national importance and affects only the Klamath Indians who are subject to the unique provisions of the Klamath Termination Act.

The issuance of a mandate of the Court of Appeals for the Ninth Circuit in this case has been vacated

² Oregon's claim [Petition, p. 13] that Klamath Indians have engaged in destructive hunting practices is not supported by the record. Moreover, the impact of Indian hunting on the Klamath deer herds is in fact minimal. Thus, the Record [R. 244-49] shows that at most 150 Indians hunt, while the state's own statistics show that in 1976, for example, 6,079 non-Indians (both residents and non-residents of Oregon) hunted on lands which were formerly Indian lands. Finally, it is relevant to note, as did the panel in *Kimball I*, 493 F.2d at 566, that the area in dispute was subject to exclusive Indian hunting and fishing control for over 100 years, from the time of the treaty in 1854 establishing the area as an Indian reservation until termination in 1954.

pending a determination by this Court of Oregon's petition for a writ of certiorari. As a result, respondents request this Court to render its decision as soon as it is practicable.

FOR THE ABOVE REASONS, respondents submit that the writ of certiorari should be denied.

DATE: May 9, 1979.

Respectfully submitted,

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